NO. 80948-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON 37904

Respondent

vs.

TYLER SHERWOOD KING

Petitioner

ON APPEAL
FROM THE DISTRICT COURT FOR CLARK COUNTY

Clark County District Cause No. 63660
Clark County Superior Court No. 06-1-02322-6
Court of Appeals No. 36606-1-II
(RALJ APPEAL)

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Tyler King, appellant below, asks this court to review the decision of the Clark County Superior Court designated below in Part B of this motion.

II. DECISION BELOW

Petitioner seeks discretionary review of the decision of the Clark County Superior Court on RALJ appeal, which affirmed his conviction in the Clark County District Court for reckless driving. The Superior Court decision was filed on July 18, 2007. A copy is included in the Appendix to this motion.

Petitioner filed a motion for discretionary review with Division II of the Court of Appeals. The commissioner denied the motion in a written ruling filed on September 25, 2007. Petitioner filed a timely motion to modify the decision. The court filed an order denying the motion to modify the commissioner's ruling on November 21, 2007. Judge Quinn–Brintnall dissented from the ruling denying the motion to modify.[1]

III. ISSUES PRESENTED FOR REVIEW

1. Did Officer Starks invade the province of the jury by testifying that in his opinion, the driving behavior exhibited by petitioner constituted reckless driving?

2. Did the District Court and Superior Court err in ruling that Mr. King's arrest by an officer out of his territorial jurisdiction was valid under RCW 10.93.070 (2) for incidents involving emergencies?

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[1] Copies of the commissioner's ruling, the panel ruling, and the Superior Court ruling are in the Appendix.

IV. STATEMENT OF THE CASE

1. Procedural History and Pretrial Motions

Petitioner Tyler King was charged by a citation filed by Vancouver Police Officer Jeff Starks with reckless driving in violation of RCW 46.61.500.

Petitioner filed a motion to dismiss the charge, based chiefly on the fact that Starks, a Vancouver Police officer, made the arrest in this case outside of his territorial jurisdiction,[2] in the absence of a valid inter-local agreement allowing him to do so. The trial court found that there was no valid inter-local agreement in effect which would allow the extra-territorial arrest, but upheld the arrest on the alternate theory that appellant's driving constituted an emergency involving an immediate threat to human life or property, under RCW 10.93.070. In the RALJ review, the Superior Court also ruled that the arrest was justified under RCW 10.93.070 (2).

Trial counsel argued at the hearing on a motion to dismiss that Officer Starks' arrest of Mr. King was unlawful because he was not on duty, was well outside of his territorial limits, and was not authorized to make an arrest by any valid existing inter-local agreement between Vancouver Police and the Clark County Sheriff. RP 2-5, 11-12. The state argued that the arrest could be justified under RCW 10.93.070 (2), on the theory that reckless driving would trigger an emergency involving an

[2] The stop was made on Interstate 5, near milepost 14, well north of the City of Vancouver's boundaries.

immediate threat to human life or property. RP 53. Defense counsel argued that there was no testimony that would support a finding that there was an immediate threat to life or property to invoke this subsection. RP 56. The trial court ruled that the officer's arrest was valid under RCW 10.93.070 (2), based on an emergency involving an immediate threat to human life or property. RP 69, 71;CP ___(Findings of Fact and Conclusions of Law). The court rejected the state's argument that a valid inter–local agreement existed that would allow the stop under RCW 10.93.070 (1). RP 75, CP___ (Findings of Fact, Conclusions of Law).

2. Trial Testimony

On April 5, 2006,Officer Jeff Starks of the Vancouver Police Department entered Interstate 5 at the La Center on ramp, milepost 16, going southbound in the middle lane to report for work. RP 161, 163. He saw Mr. King on a motorcycle, apparently standing up on the footpegs for a period of 3-4 seconds. There was a Dodge Durango truck to King's left, and another car in the right hand lane. Traffic was a little congested. RP 164.

Starks believed that standing up on the motorcycle's pegs at freeway speed was dangerous. RP 165. He observed King looking to his left at the passenger door of the Durango. King then sat down, changed lanes into the slow lane (the right lane), and then accelerated away at a high rate of speed. Stark estimated was that King was going 100 mph. However, he did not have his radar on, and did not attempt to document

his observation with a reading. RP 166. He indicated later on cross–examination that radar and laser were merely used to confirm his visual observations of speed. RP 176. He could not recall if his department has a policy that he should confirm a speed estimate with a speed measurement device before writing a ticket. RP 179.

Starks did not feel he would be able to catch the motorcycle but accelerated to try to do so. RP 167. However, the motorcycle slowed up when it reached other traffic, and he was able to get close enough to signal it to stop. RP 169. King immediately pulled over. Starks actually passed by where Mr. King had stopped, and had to back up on the shoulder to get to his position. RP 169.

The prosecutor then asked Starks his opinion regarding Mr. King's driving, and Starks replied "the entire act of what he had done was reckless [sic]." RP 171.[3] The prosecutor asked if Starks had training in the *elements* of reckless driving. Starks said he had, and then the prosecutor elicited Starks' further opinion that "this [petitioner's driving] *was within those elements*."

Officer Starks had a video camera in his car and did activate it, but by the time he did so, it only showed him driving past Mr. King and his motorcycle and then backing up to his position. RP 174. Consequently, his observation that Mr. King was "standing up" on his motorcycle was not corroborated by the video.

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[3] A copy of this page of the transcript is attached in the Appendix. The remainder of the transcript is available at the Superior Court clerk's office.

Tyler King had been riding his motorcycle for a week on the day he was stopped by Starks. It was the first bike he had owned. He had taken a three-day safety class, which cost one hundred dollars. RP 217-218.

On April 5, he rode to Longview from Vancouver. He was taking the motorcycle to the Pro Caliber store there to see if he could get the speedometer repaired. RP 219. He did not have enough for the repair, so he rode it home. RP 219. As he was going southbound on Interstate 5 in the middle lane, there was a Dodge Durango next to him. He stood up to stretch, standing on the pegs for 3-5 seconds. RP 219-20. He wanted to make sure the truck next to him saw him, because he had been in situations where cars in an adjacent lane changed lanes suddenly and he had to swerve or brake abruptly. RP 220, 238. So he kept tabs on the Durango, because it was really big. RP 221. Because of his helmet, he had to turn his head to the left to see the truck well. RP 237-238. As he felt the driver of the Durango was unaware of his presence in the lane next to them, and that he might be in the truck's blind spot, he sped up to get beyond them, and then moved into the right lane. RP 222, 226. After he sped up to pass the truck, he slowed back down to the speed of the traffic in front of him. RP 227.

When Officer Starks asked why he stood up on the bike's pegs, Mr. King told him he was stretching out because his buttocks were numb. Starks asked why he was going so fast. Mr. King said the other car bugged him and he was getting away from it. RP 230. He felt getting away from

the truck was the safest thing he could do. RP 231. He did not cut in front of the Durango, or any other traffic. He slowed as he approached the traffic which was further down the road ahead of him. RP 239.

During closing argument, the prosecutor reiterated the officer's opinion testimony:

> Officer Starks wrote him a ticket. Officer Starks said here today "I thought it was dangerous, and I felt it was reckless to me." Therefore I would ask that you convict the defendant of reckless driving. RP 273.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Review is authorized under RAP 13.5 (b)(1) and (2)

This court should accept review because the Superior Court's decision was in conflict with several Court of Appeals and Supreme Court cases which have held that when a police officer gives an opinion on the issue of guilt or innocence, the constitutional right to a fair trial is violated. By denying review of this Superior Court RALJ decision when the criteria of RAP 2.3 (d) were clearly met, the Court of Appeals committed an obvious error which has not only rendered further proceedings useless, but also has eliminated any further proceedings altogether. The Court of Appeals decision denying discretionary review is also probable error which substantially limits the freedom of a party to act, because it effectively terminates appellate review of this District Court conviction.

B. The commissioner erred in ruling that an opinion on guilt or innocence by a police officer cannot be raised for the first time on appeal.

The commissioner of the Court of Appeals ruled that Mr. King had not met the criteria of RAP 2.3, because the issue of Officer Stark's opinion testimony had not been objected to in the trial court. The commissioner relied on *Seattle v. Heatley*, 70 Wn App. 753, 954 P.2d 658(1993) for the proposition that such error could not be raised for the first time on direct appeal. The commissioner's reliance on *Heatley* is misplaced, for two reasons.

First, several court decisions since *Heatley* have held that the issue of impermissible opinion testimony by a police officer can be raised for the first time on appeal notwithstanding the lack of an objection at trial. *State v. Saunders*, 120 Wn. App. 800, 811 86 P.3d 1194 (2004); citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); *State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004), RAP 2.5(a). Secondly, petitioner also assigned error in the Superior Court to his trial counsel's failure to object to the impermissible opinion testimony as ineffective assistance of counsel. The Superior Court's decision in this case held that the failure to object was not ineffective assistance of counsel in part because of its earlier determination that *Heatley* permitted such opinion testimony, and thus the failure to object did not constituted deficient performance. Superior Court decision at 3-4, Appendix.

C. The Superior Court decision allowing Officer Stark's opinion testimony was in conflict with decisions of this court and the Court of Appeals holding that such testimony violates the constitutional right to a fair trial.

A witness' testimony which either directly or by inference gives his opinion that the person on trial is guilty is inadmissible. This is because the determination of guilt or innocence is strictly a question for the jury. *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967), *State v. Christopher*, 114 Wn. App. 858, 60 P.3d 677 (2003); *State v. Farr–Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999); *State v. Sargent*, 40 Wn. App. 340, 351, 698 P.2d 598 (1985); *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985); *State v. Oughton*, 26 Wn. App. 74, 77, 612 P.2d 812, *rev. den.* 94 Wn. 2d 1005 (1980); *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159 (1973).

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wn. 2d 336, 348, 745 P.2d 12 (1987). Particularly when given by a law enforcement officer, opinions on the ultimate issue of guilt deprive a defendant of a fair trial. *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001), *Carlin*, *supra,* at 703; *Haga*, *supra,* at 492. This is because testimony by the police may carry a special aura of trustworthiness. *Demery*, *supra* at 763, citing *United States v. Espinosa*, 827 F.2d. 604, 613 (9th Cir. 1987); Accord, *State v. Jones*, 117 Wn. App. 89

68 P.3d 1153 (2003). The expression of personal opinion by the arresting officer violates the constitutional right to a jury trial under the Sixth Amendment and Const. art. I , §22. *State v. Carlin, supra.*

The Superior Court relied on *State v Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993), *Rev. den.* at 123 Wn.2d 1011 (1994), to support its conclusion that the opinion testimony elicited by the prosecutor here was not improper. In *Heatley*, the arresting officer was allowed to testify, without objection, that Heatley was "obviously intoxicated" and "could not drive in a safe manner" in a prosecution for DUI. The *Heatley* court recognized the line of cases prohibiting opinion testimony in criminal cases on the question of guilt or innocence, such as *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967), *State v. Black*, 109 Wn. 2d 336, 348, 745 P.2d 12 (1987), and *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), but ruled that in its case, the testimony was allowable. It concluded that the testimony contained no "direct opinion" of Heatley's guilt, was based on the officer's conclusion following roadside "sobriety" testing and his observations of Heatley's physical appearance. The court also observed that Washington has a long tradition of allowing *any* witness who has a sufficient opportunity to observe to offer an opinion about a person's degree of intoxication. *Heatley, supra,* at 580. Finally, the court noted that the opinion was not framed in conclusory terms, nor did it "parrot" the elements of the crime.

Heatley thus stands as a lonely exception to the long line of

Washington cases prohibiting law enforcement officers from giving an opinion, direct or indirect, on the guilt or innocence of the accused in a criminal case. But the exception it carves out for an officer's opinion on intoxication in a prosecution for DUI was not controlling here. Officer Starks was not offering observations about an intoxicated driver to a jury presumably familiar with the effects of alcohol, who could judge the validity of his opinion based on their life experience. He was specifically asked whether in his opinion Mr. King's driving was reckless, and answered in the affirmative. And unlike the police testimony in *Heatley*, which was not tied to the elements of the offense, the officer here was specifically asked if he knew what the elements were, and whether Mr. King's driving fit the elements. This testimony went well beyond the narrow exception that was allowed by the *Heatley* court. Also, unlike a case involving intoxication, there was a real danger here that the jury's verdict was swayed by the officer's assurance to them that what he saw constituted reckless driving, since he *knew* what the elements of that crime were. This court should grant review, since the Superior Court decision was in conflict with decisions of the Court of Appeals such as *State v. Barr, supra; State v. Farr–Lenzini, supra, State v. Jones,* and *State v. Carlin* . This court should then reverse and remand for a new trial because of the admission of this improper opinion testimony.

D. Review is also authorized under RAP 2.3 (d) (2)

For the reasons stated in the preceding section, review is also

authorized under RAP 2.3 (d) (2) as well. The Washington cases that have dealt with the issue of improper opinion testimony have always pointed out that the problem with such testimony is that it invades the province of the jury to determine the facts of a case. Consequently, whether an officer can give his direct opinion that a driver's behavior violates the elements of the reckless driving statute involves a significant question of law under the Washington Constitution. The Commissioner's ruling denying review did not reach this issue, based on his decision that the error had not been preserved for direct appeal. That decision is obvious error under RAP 13.5 (b) (1) and probable error under RAP 13.5 (b) (2).

E. Review is authorized under RAP 13.5 (b) because the Commissioner and Court of Appeals erred in denying review based on the presence of an issue of public importance.

This court should also accept review because the Court of Appeals improperly denied review under RAP 2.3 (d) (3). The trial court decision and the Superior Court affirmance of that decision involves an issue of public importance which should be determined by an appellate court, namely the scope of RCW 10.93.070 (2).

Both the trial court and the Superior Court relied on RCW 10.93.070 (2) as the basis for allowing Officer Starks to make a forcible traffic stop outside of his territorial jurisdiction, and in the absence of a valid inter-local agreement. The statute provides in pertinent part as follows:

In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefore by the Washington state criminal justice

training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:

(2) In response to an emergency involving an immediate threat to human life or property....

Petitioner submits that momentarily standing on the pegs of a moving motorcycle to stretch the rider's legs, even one moving at 70 MPH, does not constitute an "emergency involving an *immediate* threat to human life or property." (Emphasis added). Nor would even the officer's uncorroborated[4] observation that Mr. King drove at a speed approaching 100 MPH on the freeway, in the absence of any indication in the record that any other traffic was affected, constitute such an emergency. There was no testimony that any other vehicle was affected by Mr. King's lane change or acceleration, and the officer admitted that Mr. King slowed down when he caught up with other traffic further down the road. The two rulings below thus stand for the proposition that there is an "emergency involving an immediate threat to human life or property" anytime a police officer sees a driver going over the speed limit. Such an interpretation completely waters down both the requirement that there be an *emergency* and that there be an *immediate* threat to human life or property. It would provide guidance to other trial courts and police agencies to have a ruling which construes the reach of RCW 10.93.070 (2). This case thus involves an issue of public interest which should be determined by an appellate

[4] Starks did not obtain any radar or laser reading of Mr. King's motorcycle.

court. Review is warranted under RAP 2.3 (d) (3).

The commissioner denied review on this basis based on his reading of *Tacoma v. Durham*, 95 Wn. App. 876, 978 P.2d 514 (1999). In that case, however, the court was construing the "fresh pursuit" section of the statute, not the "emergency" clause used as the basis for the stop in this case. Cf. RCW 10.93.070 (6) to 10.93.070 (2). The *Durham* court added only one sentence at the end of its decision, noting that the driving in its case could have qualified as an emergency involving an immediate threat to human life or property under 10.97.070 (2). However, the driving in *Durham* constituted an obvious threat to public safety not presented by Mr. King's driving. In *Durham*, the driver ran a red light, and nearly stuck another vehicle. He also drove over the centerline, which obviously created danger for oncoming drivers. In contrast, the only traffic violation arguably committed by Mr. King was speeding. There were no lane travel violations, no allegations of near collisions with other traffic, and no traffic control violations. The two cases are simply not comparable.

VI. CONCLUSION

This court should grant review of the RALJ decision of the Superior Court of Clark County for three reasons. A significant constitutional issue is raised when a police officer is allowed to give his "expert" opinion on the guilt or innocence of the accused. Secondly, the Superior Court ignored a significant line of Washington precedent in reaching its decision that this opinion testimony could be permitted, and

relied instead on the only case which is a narrow exception to this line of precedent. Moreover, the reasons which allowed the exception were not present in the case at bar. Third, this court should grant review to give guidance to trial courts on the scope of the "emergency" prong of RCW 10.93.070 (2), an issue of public importance on which there has apparently been no previous *comparable* Washington decision.

The commissioner's decision which denied review, and the decision of two out of three panel members which ratified it were error, which this court should rectify by granting review.

Dated this 3rd day of DECEMBER, 2007

LAW OFFICE OF MARK W. MUENSTER

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APPENDIX FOR MOTION FOR DISCRETIONARY REVIEW

Transcript page 171 (Officer Starks' opinion testimony)

Trial Court Findings of Fact

Superior Court decision affirming conviction

Commissioner's Decision

Order Denying Motion to Modify

RCW 10.93.070

observations of the Defendant's driving, did you form an opinion regarding his driving?

JS: Yes, I did.

PR: And what is that opinion?

JS: I felt that the entire act of what he had done was reckless in my viewpoint.

PR: Okay. And what … have you been trained on reckless driving … the elements of reckless driving?

JS: Yes.

PR: Okay. So you felt this was within those elements?

JS: I did.

PR: And did you issue him a criminal citation?

JS: I did.

PR: For reckless driving?

JS: Yes I did.

PR: Okay. Thank you Officer Starks. I have no further question at this time.

Judge: Okay. Cross examination?

CROSS EXAMINATION BY DEFENSE

JT: Thank you. Good morning Officer Starks.

JS: Good morning.

JT: You might recall that back in July I interviewed you and we did a taped interview, do you recall that?

JS: I do.

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. TYLER KING Defendant	FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DEFENDANT'S MOTION TO DISMISS No. 63660

On October 5th, 2006, in the District Court of Clark County, Washington, the Honorable Darvin J. Zimmerman, after evidence was presented and arguments made by the Plaintiff, the State of Washington, did make the following Findings of Fact and Conclusions of Law in denying the defendant's motion to dismiss.

FINDINGS OF FACT

1) On April 5th 2006, Tyler King was operating a motorcycle on I-5 southbound at exit 14.
2) Officer Jeff Starks observed the Defendant standing up on his motorcycle, interacting with another vehicle, and driving away in excess of the speed limit.
3) Officer Starks contacted the Defendant, and issued him a ticket for Reckless Driving pursuant to RCW 46.61.500.

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4) Reckless Driving per RCW 46.61.500 involves the "willful or wanton disregard for the safety of persons or property."

5) Officer Starks is a member of the VPD and made the arrest in Clark County.

6) Probable Cause existed for the arrest under 10.93.070(2), and therefore Officer Starks had authority to make an arrest outside his jurisdiction.

7) Under 10.93.070(2), an Officer can make an arrest in response to an emergency situation. Reckless driving sufficiently constitutes an emergency situation..

8) 10.93.070 subsections (1) (which dictates when an officer can make an arrest pursuant to an interlocal agreement) and (2) are exclusive of each other. Thus, Officer Starks did need not a valid interlocal agreement, because he acted in response to an emergency situation.

9) Intent of statute is to allow an officer to make an arrest in response to an emergency and the Statute is broad enough to include reckless driving.

10) Evidence has not been presented to make a finding that valid interlocal agreement exists for the purposes of this case.

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CONCLUSIONS OF LAW

Based on the findings of fact, as a conclusion of law, there were reasonable grounds for Officer Starks to stop Mr. King and issue a citation for Reckless Driving.

Based on the above, the Defendant's Motion to Suppress is DENIED

Dated this _____ day of _____, 2006

_____
The Honorable Darvin J. Zimmerman
Clark County District Court

Presented By:

_____
Patrick Robinson, Rule Nine Number, Rule Nine NO 9093513

On this 16th day of Oct, 2006.

_____ WSBA 5167

Reviewed and Approved By:

_____
Josephine Townsend, Counsel for Defendant, WSB NO _____

On this _____ day of _____, 2006.

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SUPERIOR COURT OF WASHINGTON COUNTY OF CLARK	
STATE OF WASHINGTON, Plaintiff, vs. TYLER S. KING, Defendant.	NO: 06-1-02322-6 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT having reviewed and considered the motions put forth by counsel and the arguments of counsel makes and enters the following:

I. FINDINGS OF FACT

1. On April 5, 2006 at approximately 4:50 p.m., City of Vancouver, Washington Police Officer Starks was off duty driving South bound on I-5 on his way to work.
2. All incidents described herein took place in Clark County, Washington.
3. Officer Starks is a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency.
4. Officer Starks was in uniform and driving an unmarked patrol car. His official shift started at 5:00 p.m.
5. Officer Starks observed the defendant driving a motorcycle and standing up on the foot pegs of the motorcycle for a few seconds.

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6. Officer Starks further observed the defendant, who was driving in the center lane, staring at the vehicle next to him in the far left lane.
7. Officer Starks then observed the defendant sit down and proceed to move into the far right lane and accelerate rapidly up to what the Officer estimated to be over 100 mph in a 70 mph zone.
8. Officer Starks turned on his emergency lights and stopped the defendant at approximately milepost 14.
9. Officer Starks was outside his geographical area of jurisdiction, the city limits of Vancouver, Washington, at the time he made the forcible traffic stop of the defendant.
10. Officer Starks issued the defendant a citation for reckless driving.
11. Officer Starks testified at trial that he was familiar with the elements of reckless driving and that in his opinion the defendant's driving was reckless.
12. During closing arguments, the Prosecutor commented that Officer Starks believed the defendant's actions constituted reckless driving.
13. The Prosecutor also made the comment during closing arguments, referring to the speed at which the defendant was driving, that "I don't even think my car goes that fast."

II. CONCLUSIONS OF LAW

In consideration of the above facts and the Court otherwise being fully informed of the law, the Court makes the following Conclusions of Law:

1. The court has jurisdiction over the person and subject matter of this appeal.
2. The arrest and citation of the defendant for reckless driving herein was lawful.

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3. The driving Officer Starks observed constituted an emergency situation involving a threat to life or property; therefore he was authorized under RCW 10.93.070(2) to arrest the defendant as a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency.

4. At trial, Officer Starks' testimony that in his opinion the defendant drove recklessly did not deny the defendant a fair trial. Officer Starks did not testify that the defendant was guilty. Rather, Officer Starks provided his opinion that the defendant drove in a reckless manner based on his prior experience and training. This type of testimony is permitted as lay opinion pursuant to *City of Seattle v. Heatley*, 70 Wn.App. 573 (1993) and ER 701.

5. The defendant was not denied a fair trial due to prosecutorial misconduct. The Prosecutor's comment about his own car and his reference to Officer Starks' opinion that the defendant drove recklessly during closing arguments were only innocuous and off-hand remarks that were unlikely to have affected the jury's decision. If the Prosecutor's comments during closing argument were improper or erroneous, any error was harmless.

6. The defendant's attorney did not render ineffective assistance of counsel by failing to object to Officer Starks' opinion testimony and by failing to object to the Prosecutor's comment about his own car made during closing arguments. Regarding ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) is frequently cited. Defendant did not meet the *Strickland* standard in this case. There has not been a showing that

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defense counsel's performance was deficient and/or that the defendant was prejudiced. Prejudice requires error so serious that the reliability of the verdict is placed in question. If defense counsel made a mistake by not objecting, there is no reasonable likelihood that this failure changed the result of the trial. The possibility exists that this was a tactical decision intended to not draw undue attention to the prosecutor's comments.

7. Based upon the above, the conduct herein is affirmed and the case remanded to District Court for further action as needed.

Found July 16, 2007

Judge John P. Wulle

Presented by:

Jeffrey W. Holmes WSBA #37904
Deputy Prosecuting Attorney

Approved as to Form:

Mark Muenster WSBA #11228
Attorney for Defendant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TYLER S. KING, Petitioner.	No. 36606-1-II RULING DENYING REVIEW

A district court jury convicted Tyler King of reckless driving. The superior court affirmed the conviction. King now seeks discretionary review of the superior court's decision, arguing that a police officer commented on his guilt and that the officer cited him outside of the officer's territorial jurisdiction. Concluding that King fails to meet the criteria for discretionary review, this court denies review.

While driving to work on April 5, 2006, on Interstate 5 north of Vancouver, Vancouver Police Officer Jeff Starks saw a motorcyclist standing on the pegs of his motorcycle for three to four seconds while driving about 70 miles per hour. He saw the motorcyclist sit down and speed away at about 100 miles per hour. He stopped the motorcyclist, who he identified as King, and cited him for reckless driving.

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d).

First, King argues that the superior court's ruling, that Officer Starks did not improperly opine as to King's guilt, conflicts with *State v. Farr-Lenzini*, 93 Wn. App. 453 (1999), *State v. Jones*, 117 Wn. App. 89 (2003), and *State v. Carlin*, 40 Wn. App. 698 (1985). He contends that the superior court erred in concluding that *State v. Heatley*, 70 Wn. App. 573 (1993), *review denied*, 123 Wn.2d 1011 (1994), allowed Officer Starks to testify as to his opinion about King's driving.

But King did not object to Officer Starks' testimony. And as *Heatley* makes clear, a claim of improper opinion testimony cannot be raised for the first time on appeal. 70 Wn. App. at 583-86. Because he did not raise the issue in the district court, he cannot show that the superior court's ruling conflicted with rulings of the appellate courts.

Second, King argues that the superior court's ruling, that his driving constituted an emergency such that Officer Starks could cite him outside his territorial jurisdiction, involves an issue of public interest that this court should address. Under RCW 10.93.070(2), a police officer has the authority to enforce traffic laws outside his or her

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[1] Mot. for Disc. Rev., Appendix excerpt from transcript at 171.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TYLER SHERWOOD KING,

Appellant.

No. 36606-1-II

ORDER DENYING MOTION TO MODIFY

APPELLANT has filed a motion to modify a Commissioner's ruling dated September 25, 2007, in the above-entitled matter. Following consideration, the court denies the motion.

Accordingly, it is

SO ORDERED.

DATED this 21st day of November, 2007.

PANEL: Jj. Hunt, Quinn-Brintnall, Penoyar

FOR THE COURT:

PRESIDING JUDGE

I dissent from decision denying motion to modify.

JUDGE

Jeffrey W Holmes
Clark County Prosecuting Atty
1013 Franklin St
Vancouver, WA, 98660-3039

Mark W. Muenster
Attorney at Law
1010 Esther St
Vancouver, WA, 98660-3028

RCW 10.93.070

General authority peace officer — Powers of, circumstances.

In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:

(1) Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs;

(2) In response to an emergency involving an immediate threat to human life or property;

(3) In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority;

(4) When the officer is transporting a prisoner;

(5) When the officer is executing an arrest warrant or search warrant; or

(6) When the officer is in fresh pursuit, as defined in RCW 10.93.120.

[1985 c 89 § 7.]